

## **Appendix A**





LEONIDAS RALPH MECHAM  
Director

## ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

CLARENCE A. LEE, JR.  
Associate Director

WASHINGTON, D.C. 20544

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MEMORANDUM TO: JUDGES, UNITED STATES COURTS  
CLERKS, UNITED STATES COURTS

SUBJECT: Electronic Filing (**INFORMATION**)

The Supreme Court has prescribed amendments to Fed. R. App. P. 25, Fed. R. Civ. P. 5 and Fed. R. Bank. P. 5005, which would permit electronic filing in appellate, district, and bankruptcy courts under certain circumstances. These amendments will take effect on December 1, 1996. Under the revisions, a court may permit, by local rule, electronic filing if consistent with technical standards, if any, established by the Judicial Conference. The Committee Note to the proposed revision to Fed. R. Civ. P. 5 states that it is anticipated that the Conference will promulgate technical standards for transmission of data, such as the formatting of data, the speed of transmission, the means to transmit supporting documentation, and the security of communication. The Administrative Office is currently developing proposed technical guidelines which will soon be distributed for court and public comment and thereafter submitted for consideration by the Committee on Automation and Technology and, subsequently, by the Judicial Conference of the United States.

In addition to technical issues, the use of electronic filing raises important policy concerns that were identified by the Court Administration and Case Management Committee of the Judicial Conference at its June 1996 meeting. In that regard, the Committee directed the Administrative Office to bring these issues to the attention of the courts prior to December 1, 1996. These concerns include: custody and control of the court docket; fees; public access; and reporting issues. In addition to these issues, there are certain issues relating to electronic filing which arise only when an outside party is responsible for the implementation and/or administration of electronic filing services. All of these issues, along with many others, are currently being considered by the Administrative Office as part of the Electronic Case Files (ECF) study. The ECF study expects to produce a draft report in December 1996 for consideration and comment by the court community. A second report, due September 1997, will address these issues further and will provide guidance to courts wishing to implement electronic filing. In the interim, however, it is important that courts be aware of these operational issues as they begin to consider electronic filing alternatives which may affect clerk's office responsibilities. The attached document is intended to provide courts with preliminary information concerning the operation of an electronic filing system.

Any questions on the issues discussed in this memorandum may be addressed to Mary Louise Mitterhoff or Mary Fritsche, Attorneys, Office of Court Programs, 202/273-1547.

/s/

Leonidas Ralph Mecham

Attachment

cc: Circuit Executives  
District Court Executives  
Chief Probation Officers  
Chief Pretrial Services Officers

# OUTLINE OF MAJOR ISSUES RELATED TO IMPLEMENTATION OF ELECTRONIC FILING

## **Introduction**

Implementation of electronic filing programs will have a significant impact on clerks' office procedures as well as on their responsibilities. The following guidance is provided to assist clerks as they consider implementation of electronic filing programs.

### **1. Control of Docket and Docketing Responsibility**

Control of and responsibility for the court's dockets is a primary function of a clerk's office.<sup>1</sup> In some of the electronic filing experiments currently in use in federal courts, the docketing function has been removed from the clerk's office. With the exception of orders, which would still be entered by deputy clerks, docketing, i.e., the naming of a document and its entry onto the docket, is, in some cases, actually performed by the filing party. This procedure increases the possibility that a document could be improperly docketed.<sup>2</sup> Therefore, the clerk must ensure, when docket entries are made by an outside party, that necessary precautions are taken to safeguard the integrity of the court's dockets, which means that the clerk must regularly and systematically monitor docket entries made by parties.

As noted above, responsibility for the court's dockets is a primary function of a clerk's office which is set forth by statute or federal rule. This requirement does not mean, however, that the clerk must maintain actual physical custody of the court's records at all times. As long as the clerk retains effective control over the court's records, including electronic records, his or her

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<sup>1</sup> For courts of appeals, this responsibility is set forth in Fed. R. App. P. 45(b), which provides that "[t]he clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders, and judgments." For district courts, Fed. R. Civ. P. 79(a) requires that "[t]he clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable.... All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket...." In addition, Fed. R. Bank. P. 5003(a) provides that "The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case...." 28 U.S.C. 156(e) provides that "the bankruptcy clerk shall be the official custodian of the records and dockets of the bankruptcy court."

<sup>2</sup> An improperly captioned docket entry can create many potential problems. For example, a docket entry relating to real property which is improperly captioned could result in a title search being incorrect or in the irrevocable sale of property. In addition, an incomplete caption could result in parties being unaware of response dates.

status as official custodian of the records is not abrogated.<sup>3</sup> This may mean that in order to control and preserve the records, the clerk must be in possession of an identical and contemporaneous database separate from that of a vendor.

## **2. Fees**

Filing fees for the federal courts are set forth by statute, and by the Judicial Conference pursuant to authority granted to them by statute, 28 U.S.C. §§ 1913, 1914, 1926 and 1930. Clerks of the various federal courts may only charge those fees as provided by statute or set by the Judicial Conference. To date, although alternative fee structures for electronic filing are under consideration by the ECF study, the Judicial Conference has not promulgated any fees that relate to electronic filing. Therefore, absent Judicial Conference action in this area, no fees, in addition to those set forth by statute or in the Miscellaneous Fee Schedules, should be charged by any clerk's office for electronic filing. However, participants in electronic filing programs should be notified that a supplemental fee may be imposed at a later date.

As noted above, a prescribed fee must accompany the filing of certain documents.<sup>4</sup> Courts that wish to establish an electronic filing system must develop a procedure for collecting filing fees when a document is filed electronically.

Another issue regarding fees may be raised in situations where a vendor is providing the electronic filing system. Care should be taken to ensure that the relationship between the clerk's office and the vendor is structured so that the vendor is not construed to be collecting fees as an agent of and on behalf of the court. If the vendor were viewed as an agent, the vendor might therefore be required to give those fees to the Treasury under the miscellaneous receipts statute, 31 U.S.C. § 3302(b).

## **3. Signature Authority**

Electronic filing also affects the issue of signature authority. Federal rules typically require an "original" signature on documents filed with the court. Signature requirements provide some form of verification that the document being filed is indeed being filed by the purported filing party. An electronic signature filed in accordance with the local rule of a court can provide such verification by using, for example, a password.<sup>5</sup> The clerk must ensure that whatever means a court chooses to accept to meet signature requirements provides security and is set forth clearly in a local rule, standing order, or court operating procedure available to the bar.

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<sup>3</sup> Office of General Counsel Memorandum regarding Complex Litigation Automated Docket, August 24, 1995, page 4.

<sup>4</sup> For example, federal rules require a bankruptcy petition to be accompanied by the filing fee. Fed.R.Bankr.P. 1006(a).

<sup>5</sup> Office of General Counsel Memorandum regarding Complex Litigation Automated Docket states "this purpose can be fully met by an electronic signature, such as the filing of attorney's initials and the last four digits of that attorney's social security number." August 24, 1995. p.4.

#### **4. Public Access**

The records and dockets of the federal courts are public records and should be available and open to examination at reasonable times without charge. The clerk must ensure that whatever electronic filing process is adopted, adequate access to these records is granted to the public, i.e., parties that are not able to access electronic records from a remote location via modem.

#### **5. Reporting Requirements**

The clerk has statistical reporting responsibilities, both to the court and to the Administrative Office. Currently, these responsibilities are simplified and expedited by the court's automated database and docketing systems, which have the capacity to generate reports and information for the court. The clerk must ensure that all national and local reporting requirements are met, regardless of the type of electronic filing process utilized by the court, and that his or her ability to access necessary information quickly and efficiently is not compromised by the court's decision to adopt electronic filing.

#### **6. Procurement**

When a third party vendor is being sought to provide a court's electronic filing system, the general principles of government procurement law apply. These principles require that the choice of an automation provider to administer electronic filing services be made through the appropriate procurement procedures. A court that wishes to contract with an outside vendor for the provision of electronic filing services should ensure that the award is made only in accordance with the provisions of the Guide to Judiciary Policies and Procedures, Volume XIII, Chapter XIV. To the extent that such services are paid by government funds, they must be expended through the Judiciary Information Technology Fund using monies reprogrammed from the local court.<sup>6</sup>

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<sup>6</sup> Projects funded through the Judiciary Information Technology Fund should: conform to the judiciary's Information Systems Architecture (ISA); adhere to the automation management process; fully consider integration with other projects and products; and utilize to the extent possible existing communications, and computing hardware and software components that comprise the communications and processing infrastructures of the ISA.